GUYETTE & COMPANY
LAW BRIEF PRINTERS
TULSA - OKLAHOMA

FILE COPY

Supreme Court, U. S.
FILED
MAY 8 193
CHARLES ELMORE CR

No. 78

# In the Supreme Court of the United States

OCTOBER TERM, 1929

MARSHALL L. MOTT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statement | 2 |
| Reasons for not opposing the petition | 4 |


## CITATIONS


| | |
|---|---|
| *American Baptist Home Mission Society* v. *Barnett*, 278 U. S. 626 | 6 |
| *Barnett* v. *Equitable Trust Co.*, 21 F. (2d) 325, 332 | 6 |
| *Equitable Trust Co.* v. *United States*, 34 F. (2d) 916 | 6 |
| Act of May 27, 1908, c. 199, 35 Stat. 312 | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 810

MARSHALL L. MOTT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 68) is reported in 37 F. (2d) 860.

The opinion of the United States District Court for the Northern District of Oklahoma (R. 55) is reported in 33 F. (2d) 340.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered February 3, 1930. (R. 72.) Petition for certiorari was filed April 11, 1930.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

If the merits of the question can now be considered, the question involved is whether the Secretary of the Interior had the power, under the Act of May 27, 1908, c. 199, 35 Stat. 312, to approve, so as to render valid, gifts by a mentally incompetent full-blood member of the Creek Tribe of Indians, which is one of the Five Civilized Tribes in Oklahoma, of the greater part of the Indian's restricted property, the gifts amounting in value to more than $1,000,000.

Incidental to the determination of that question are the questions: (1) whether such a disposition of the Indian's restricted property was for the benefit of the Indian within the meaning of Section 1 of the Act, and (2) whether the Secretary of the Interior could validly approve such disposition of the Indian's property where the Indian was incompetent to initiate the making of the gifts on account of his lack of mental capacity and his inability to understand what he was doing.

## STATEMENT

This suit was brought by the United States against the petitioner in the United States District Court for the Northern District of Oklahoma to recover bonds of the par value of $15,000, or the proceeds thereof, given to petitioner by Anna Laura Barnett, the alleged wife of Jackson Barnett, in connection with alleged gifts of bonds by Jackson Barnett of the par value of $1,100,000. Half of

the $1,100,000 worth of bonds were transferred to Anna Laura Barnett by the Secretary of the Interior and half to the Equitable Trust Company in trust for certain institutions, following the approval by the Secretary of the Interior of the instrument of gift, thumb-marked by Barnett and set out at pages 22–25 of the record.

The original bill of complaint does not appear in the record. An amended bill of complaint was filed, which petitioner moved to dismiss. (R. 1, 34.) While this motion was pending, the United States applied for leave to file a second amended bill of complaint. (R. 44.) This second amended bill of complaint alleged, among other things, that Jackson Barnett is an aged full-blood member of the Creek Tribe of Indians (R. 46–47); that the bonds involved were purchased by the Secretary of the Interior with money derived from oil and gas royalties from Barnett's restricted allotment (R. 47–48); that Barnett at the time of making the instrument of gift was unable "to read or write any language, or to understand elementary arithmetic, or to readily comprehend the English language, nor by reason of his mental infirmity was he able to appreciate the nature, or amount of his property, or to realize the portions of it so disposed of and distributed, nor was he, at the times complained of, able to understand, and at no time since has understood, the terms and conditions upon which the said delivery of said bonds was made by the said Secretary of the Interior" (R. 49–50);

and that the petitioner, before and at the time of the receipt of said bonds, had actual knowledge of all the facts and circumstances relative to Barnett's mental incompetency, the source from which said bonds were derived, and the restrictions imposed thereon. (R. 50–51.) The District Court refused to allow the second amended bill to be filed and dismissed the case, on the ground that the bill did not state a cause of action. (R. 55–58.)

On appeal the Circuit Court of Appeals held (R. 68) that the gift to Anna Laura Barnett, evidenced by the thumb-marked request of Barnett (R. 22–24), was not for Barnett's benefit and not within the power of the Secretary of the Interior to approve under the authority vested in him by Section 1 of the Act of May 27, 1908. The court accordingly reversed the decision of the District Court and remanded the case to that court with directions to reinstate the suit and permit the United States to file its second amended complaint. (R. 68–72.)

## REASONS FOR NOT OPPOSING THE PETITION

We think that the decision of the Circuit Court of Appeals was right, and that there is no conflict between that decision and any of the decisions of this Court or of any other Circuit Court of Appeals. Furthermore, the judgment sought to be reviewed remands the case to the District Court with directions to reinstate the suit and to permit the United States to file its second amended com-

plaint, and is thus interlocutory in character. (R. 72.) Under ordinary circumstances we should oppose a petition for a writ of certiorari in such a case. We do not oppose the granting of the writ in this case because we believe a determination by this Court of the questions decided in the Court below will lead to a speedy determination of burdensome litigation pending in several of the District Courts.

There are now pending in the United States District Courts for the District of Kansas and the Southern District of California and in the Supreme Court of the District of Columbia the following suits: (1) against Harold C. McGugin, who received part of the bonds given Anna Laura Barnett (R. 50), to recover the same, or the proceeds thereof; (2) against Anna Laura Barnett to recover the bonds which she retained out of the gift to her or the property in which the proceeds were invested; and (3) against the Riggs National Bank to recover bonds of the par value of $200,000 placed in trust in that institution (R. 24–25), or the proceeds thereof. In so far as the validity of the gifts and the effect of the approval thereof by the Secretary of the Interior is concerned, the pleadings on behalf of the United States are substantially the same as that in the instant case, except that in the California case additional equitable relief is prayed on the ground that Anna Laura Barnett, the alleged wife of Jackson Barnett, is not entitled to any prop-

erty rights in his estate by reason of a marriage contract which the Government contends is void.

In the case of *Barnett* v. *Equitable Trust Co.*, 21 F. (2d) 325, 332, the District Court for the Southern District of New York set aside a gift of half of the bonds on the ground that Barnett did not have sufficient mentality to comprehend what he was doing when he made the gift. Although the court gave a different reason for its decision, the result reached in that case was the same as that reached by the Circuit Court of Appeals in the instant case. An appeal from the decision was dismissed by the Circuit Court of Appeals for the Second Circuit because of the failure of the appellant to procure an order of severance as to its codefendant. 26 F. (2d) 350. Certiorari was refused by this Court. (*American Baptist Home Mission Society* v. *Barnett*, 278 U. S. 626.)

Thereafter, this Court granted certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Equitable Trust Co.* v. *United States*, 34 F. (2d) 916, which is now pending before this Court. (No. 530.) That case grew out of the case mentioned in the preceding paragraph, and involves the question whether the courts have power to allow the payment of counsel fees out of the restricted property of Barnett.

If this Court should now review the question whether the second amended bill of complaint in

the instant case states a cause of action, its decision would materially aid in the disposition of the other pending suits involving portions of this same Indian trust fund.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*

SETH W. RICHARDSON,
*Assistant Attorney General.*

CLAUDE R. BRANCH,
*Special Assistant to the Attorney General.*

NAT M. LACY,
W. MARVIN SMITH,
*Attorneys.*

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930